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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/895,235	06/28/2001	Lance W. Russell	10003532-1	8674
22879	7590	05/07/2009	EXAMINER	
HEWLETT PACKARD COMPANY			BILGRAMI, ASGHAR H	
P O BOX 272400, 3404 E. HARMONY ROAD			ART UNIT	PAPER NUMBER
INTELLECTUAL PROPERTY ADMINISTRATION				
FORT COLLINS, CO 80527-2400			2443	
NOTIFICATION DATE		DELIVERY MODE		
05/07/2009		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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INTELLECTUAL PROPERTY ADMINISTRATION  
FORT COLLINS CO 80527-2400

MAILED

MAY 06 2009

TECHNOLOGY CENTER 2100

In re Application of: RUSSELL, Lance W.  
Application No. **09/895,235**  
Filed: June 28, 2001  
For: MIGRATING RECOVERY MODULES IN  
A DISTRIBUTED COMPUTING  
ENVIRONMENT

**DECISION ON PETITION  
UNDER 37 C.F.R. §1.181**

This is a decision on the petition filed on November 18, 2008, requesting to set aside (withdrawal) of non final office action mailed September 18, 2008, (herein after referred to as the "pending office action") and to reinstate the Appeal Brief that was pending at the time the pending non final office action was mailed.

This petition is hereby **GRANTED**.

**RELEVANT HISTORY**

- 05/12/05 Final Rejection is mailed.
- 08/12/05 First Notice of Appeal was filed in response to office action mailed 5/12/05.
- 10/13/05 First Appeal Brief was filed.
- 01/13/06 First office action in response to after appeal brief filed 10/13/05 was mailed.
- 04/07/06 Applicant's Reply in response to office action mailed 1/13/06 is filed.
- 07/03/06 Second Final office action is mailed in response to Applicant's reply filed 4/7/06.
- 08/25/06 Third Supplemental final office action is mailed.
- 12/01/06 Request for Continued Examination (RCE) is filed in response to action mailed 8/25/06.
- 02/08/07 Non-final office action was mailed in response to RCE filed 12/01/06.

05/07/07      Applicant's Reply in response to office action mailed 2/08/07 is filed

07/31/07      Final office action was mailed in response to Applicant's reply filed 5/7/07.

10/31/07      Second Notice of Appeal Brief is filed in response to action mailed 07/31/07.

12/20/07      Second Appeal Brief is filed in response to Notice of Appeal filed 10/31/07.

03/20/08      Non-final office action is mailed in response to the brief filed 12/20/07.

06/17/08      Third Notice of Appeal filed in response to office action mailed 3/20/08.

**06/17/08      Third Appeal Brief filed in response to Notice of Appeal filed 6/17/08.**

**09/18/08      Non-final action in response to Appeal brief filed 06/17/08 was mailed.**

11/18/08      Petition under 37 CFR 1.181 is filed, Appellant petitions the Director to set aside the office action mailed 09/18/08 (hereafter referred to as the "pending office action") and reinstate the Appeal Brief that was pending at the time the pending office action was mailed.

12/18/08      Fourth Notice of Appeal and Fourth Appeal Brief in response to office action mailed 9/18/09.

02/05/08      Non-final office action in response to Appeal Brief filed 12/18/08 is mailed.

### **RULES & REGULATIONS**

#### **MPEP 1207.03 (III) Situations that are not considered as new grounds of rejection:**

There is no new ground of rejection when the basic thrust of the rejection remains the same such that an appellant has been given a fair opportunity to react to the rejection. See *In re Kronig*, 539 F.2d 1300, 1302-03, 190 USPQ 425, 426-27 (CCPA 1976). Where the statutory basis for the rejection remains the same, and the evidence relied upon in support of the rejection remains the same, a change in the discussion of, or rationale in support of, the rejection does not necessarily constitute a new ground of rejection. *Id.* at 1303, 190 USPQ at 427 (reliance upon fewer references in affirming a rejection under 35 U.S.C. 103 does not constitute a new ground of rejection).

#### **MPEP § 1204.01 Reinstatement of Appeal:**

If an appellant wishes to reinstate an appeal after prosecution is reopened, appellant must file a new notice of appeal in compliance with 37 CFR 41.31 and a complete new appeal brief in compliance with 37 CFR 41.37. Any previously paid appeal fees set forth in 37 CFR 41.20 for filing a notice of appeal, filing an appeal brief, and requesting an oral hearing (if applicable) will be applied to the new appeal on the same application as long as a final Board decision has not been made on the prior appeal.

**MPEP § 1207.04** states in part that:

The examiner may, with approval from the supervisory patent examiner, reopen prosecution to enter a new ground of rejection after appellant's brief or reply brief has been filed. The Office action containing a new ground of rejection may be made final if the new ground of rejection was (A) necessitated by amendment, or (B) based on information presented in an information disclosure statement under 37 CFR 1.97(c) where no statement under 37 CFR 1.97(e) was filed.

## OPINION

Non-final action mailed 9/18/08 in response to Appeal brief filed 06/17/08 does not constitute new ground of rejection in accordance with MPEP §1207.03 (III) above mentioned, because the basic thrust of the rejection remains the same such that an appellant has been given a fair opportunity to react to the rejection.

For the above stated reasons, the petition is **GRANTED**.

Thus, the Appeal Brief filed on June 17, 2008 will be entered and the previously paid appeal fees set forth in 37 CFR § 41.20 for filing a Notice of Appeal will be applied to the new appeal on this application.

Non-final office actions mailed 09/18/08 and 02/05/08 in response to Appeal Brief filed 06/17/08 and 12/18/08, respectively, are to be withdrawn by examiner.

The application will be forward to the examiner of record to consider the Appeal Brief and issue a proper Office communication.

Any inquiry regarding this decision should be directed to the undersigned whose telephone number is (571) 272-3902. If attempts to reach the undersigned by telephone are unsuccessful, Kim Huynh, Quality Assurance Specialist, can be reached at (571) 272-4147.

/bp/

/Beatrix Prieto/

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Beatrix Prieto, Quality Assurance Specialist  
Technology Center 2400  
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